VERFASSUNGSGERICHTSHOF
G 30/2022-12
18 June 2022

# IN THE NAME OF THE REPUBLIC!

The Constitutional Court,

chaired by President
Christoph GRABENWARTER,

in the presence of Vice-President
Verena MADNER

and the members
Markus ACHATZ,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Michael MAYRHOFER,
Michael RAMI and
Ingrid SIESS-SCHERZ

as well as the substitute members
Nikolaus BACHLER and
Daniel ENNÖCKL

as voting members, in the presence of the recording clerk
Niklas FINZ

decided today after private deliberations pursuant to Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) in the case of the application filed by 1st ********** and 2nd **********, both **********, **** ****, both represented by Helmut Graupner, Attorney at Law, Maxingstrasse 22-24/4/9, 1130 Vienna, to repeal for unconstitutionality section 26 paragraph 1 of the Federal Act on Private International Law (*Internationales Privatrechts-Gesetz, IPR-G*) Federal Law Gazette *BGBl. 304/1978*, as amended by Federal Law Gazette *BGBl. I 58/2018*.

The application is dismissed.

## Reasoning

## I. The Application

Based on Article 140 paragraph 1 sub-paragraph 1 point d of the Constitution (*Bundes-Verfassungsgesetz, B-VG*), the applicants demand that the Constitutional Court,

"without setting a deadline for the provision to lapse,
A.
repeal paragraph 1 of section 26 of the International Private Law Act (*Internationales Privatrechts-Gesetz, IPR-G*), Federal Law Gazette *BGBl. 304/1978*, as amemded by Federal Law Gazette *BGBl. I 58/2018*, as unconstitutional,
B. in eventu
repeal paragraph 1 of section 26 of the International Private Law Act, as amended in Federal Law Gazette *BGBl. I 58/2018*, as unconstitutional,
C. in eventu
repeal the International Private Law Act, Federal Law Gazette *BGBl. 304/1978*, as amended by Federal Law Gazette *BGBl. I 72/2019*, in its entirety as unconstitutional."

## II. The Law

The relevant provisions of the Federal Act of 15 June 1978 on International Private Law (*Internationales Privatrechts-Gesetz, IPR-Gesetz*), Federal Law Ga-

zette *BGBl. 304/1978*, as amended by Federal Law Gazette *BGBl. I 58/2018*, read as follows (the provision challenged in the main application is underlined):

"Ordre public clause

Section 6. A provision of foreign law is not to be applied if its application would lead to a result that is incompatible with the fundamental values of the Austrian legal system. If necessary, a corresponding provision of Austrian law is to be applied instead.

[…]

Law governing a natural person

Section 9. (1). The law governing a natural person is the law of the state whose citizen the person is. If a person holding a foreign citizenship also holds the Austrian citizenship, the latter shall apply. For other holders of multiple citizenships, the citizenship of the state with which the person entertains the strongest relationship shall be relevant.

(2) If a person is stateless or if their citizenship cannot be clarified, they shall be governed by the law of the state in which they have their place of habitual residence.

(3) The law governing persons who are refugees within the meaning of international conventions applicable to Austria or whose relations with their home state have been severed for similarly serious reasons, shall be the law of the state in which they have their domicile or, in the absence thereof, their place of habitual residence; a reference of this law to the law of the home state (section 5) shall be irrelevant.

[…]

Adoption

Section 26. (1) <u>The prerequisites for adoption and the annulment of adoption are to be assessed on the basis of the law governing the adopter and the law governing the child. If the child is incapable of taking a decision, the law governing the child shall be relevant only with regard to the consent of the child or a third party related to the child under family law.</u>

(2) The effects of adoption are to be assessed on the basis of the law governing the adopter, in the event of adoption by a married couple in accordance with the law governing the personal legal effects of marriage, and after the death of one of the spouses in accordance with the law governing the surviving spouse."

## III. Initial proceedings, submission of the application and preliminary proceedings

1. The applicants are registered partners and concluded an adoption contract regarding the minor *** with *Wiener Kinder- und Jugendhilfe* (Office of the Municipality of Vienna providing support to children and adolescents) on 24 September 2021. With its decision dated 20 January 2022, the Vienna Inner City District Court (*Bezirksgericht Innere Stadt Wien*) rejected the application for approval of the adoption, reasoning that the prerequisites for adoption are to be assessed on the basis of the nationality of the applicants according to Czech and Slovak law (cumulatively), and that according to Czech law adoption by couples living in a registered partnership is not possible.

2. The applicants sought legal remedy against this decision and, on this occasion, filed the present application for judicial review. In their application, they present their concerns in terms of constitutional law as follows:

" ... "

3. The Federal Government submitted a statement in which it denies the admissibility of the application and counters the constitutional concerns expressed by the applicants as follows:

" … "

## IV. Considerations

### 1. As to the admissibility

1.1. Pursuant to Article 140 paragraph 1 sub-paragraph 1 point d of the Constitution, the Constitutional Court pronounces on the unconstitutionality of laws upon an application filed by a person claiming to have been violated in their rights as a party in a case decided by an ordinary court of first instance based an unconstitutional law, provided legal remedy has been sought against this decision. Pursuant to the first sentence of paragraph 1 of section 62a of the Constitu-

tional Court Act (*Verfassungsgerichtshofgesetz, VfGG*), a person claiming to have been violated in their rights as a party in a case decided by a court of first instance through the application of an unconstitutional law can file an application demanding that the law be repealed as unconstitutional.

1.2. The present application was filed on the occasion of legal remedy sought against the decision rendered by the Vienna Inner City District Court on 20 January 2022, 6 P 121 21w-7. The case was thus decided by an ordinary court of first instance (Article 140 paragraph 1 sub-paragraph 1 point d *BV-G*).

1.3. The applicants in the constitutional-law proceedings, as applicants in the civil-law proceedings, are parties to the proceedings before the ordinary court and, as such, entitled to file an application pursuant to Article 140 para. 1 BV-G.

1.4. The applicants met the requirement of submission on the occasion of legal recourse by filing the present application and seeking legal remedy against the aforementioned decision by the Vienna Inner City District Court on the same day (cf. *VfSlg. 20.074/2016*).

Furthermore, the Constitutional Court, on the basis of the respective communication by the Vienna Inner City District Court, deems the legal remedy sought to be timely and admissible.

1.5. Pursuant to section 62 paragraph 2 of the Constitutional Court Act, an application to repeal a law or certain parts thereof, based on Article 140 paragraph 1 sub-paragraph 1 point d of the Constitution, can be filed only if the law is to be directly applied by the court in the pending case or if the constitutionality of the law is – or would be in the applicant's opinion - the subject of a preliminary ruling regarding the decision by the court in the pending case. Filing an application pursuant to Article 140 paragraph 1 sub-paragraph 1 point d of the Constitution therefore is conditional on the challenged provision being a prerequisite for the decision by the ordinary court in the initial case (cf. *VfSlg. 20.010/2015, 20.029/2015*).

The court of first instance explicitly applied section 26 paragraph 1 of the Private International Law Act, the unconstitutionality of which is claimed by the appli-

cants, and thus rejected the application for approval of adoption on these grounds, stating that Czech law, which is to be applied pursuant to this provision, forbids adoption by registered partners of a same-sex partnership. The challenged provision is therefore deemed to be setting a precedent.

1.6. The Federal Government deems the present application to be inadmissible. Summarizing its reasoning, the Federal Government states the following:

In the Federal Government's opinion, the applicants' concerns under constitutional law are not directed against the conflict-of-law provision of section 26 para. 1 *IPG-G*, but against the fact that the foreign law excludes adoption in this case. Given that foreign law cannot be subjected to constitutional court proceedings pursuant to Article 140 of the Constitution, the question arises if and in what form the foreign law has an impact on the Austrian legal system and if the challenged provision constitutes the basis for the alleged unconstitutionality.

The Federal Government holds that the foreign law is not to be enforced by court in the same manner as a federal act, but is to be treated as part of the facts of the case or, if appropriate, applied as foreign law. Consequently, according to the Federal Government, the foreign law is not accessible to judicial review by the Constitutional Court. However, this has no negative consequences, as it is subject to the ordre public clause pursuant to section 6 *IPR-G*, according to which a provision of foreign law is not to be applied if it is incompatible with the fundamental values of the Austrian legal system.

In contrast, the Federal Government holds that, pursuant to Article 140 of the Constitution, the Private International Law Act itself can be subjected to judicial review by the Constitutional Court without restrictions. If the alleged unconstitutionality is based on the conflict-of-law provision itself, this can result in the provision being repealed. However, the applicants have not expressed any concerns that the connecting factor to the personal statute of the adopters in section 26 para. 1 of the Private International Law Act as such is unconstitutional. In summary, therefore, the Federal Government regards the application as inadmissible, as the applicants' concerns are not directed against the challenged provision, but against the foreign law to be applied.

1.7. The Constitutional Court does not share the concerns expressed by the Federal Government as regards the admissibility of the application:

Contrary to the statement by the Federal Government, the applicants express concerns under constitutional law regarding section 26 para. 1 of the Private International Law Act. They rightly state that it is this very provision that permits the application of foreign law in Austria. In this specific case, section 26 para. 1 *IPR-G* results in the application of a law according to which adoption cannot be approved because the applicants are homosexual and living in a registered partnership.

1.8. Given that the main application proves to be admissible, there is no need for the Court to consider the alternative applications.

**2. On the merit**

In proceedings initiated upon an application filed to review the constitutionality of a law pursuant to Article 140 of the Constitution, the Constitutional Court has to limit itself to deliberations on the concerns raised (cf. *VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003*). The Court therefore has to exclusively assess whether the challenged provision is unconstitutional on the grounds outlined in the reasoning of the application (*VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*).

The application is unfounded.

2.1. In summary, the applicants present their concerns, which motivated them to file an application with the Constitutional Court, as follows:

They state that paragraph 1 of section 26 of the Private International Law Act stipulates that the prerequisites for adoption of a minor are to be assessed on the basis of the personal statute of each adopter. However, Czech and Slovak law, to be applied in this case, do not allow adoption by same-sex couples. The applicants regard this as a violation of their fundamental rights. They argue that the challenged provision results in denying same-sex couples access to adoption exclusively on account of their gender and their sexual orientation, a fact which

the Constitutional Court already ruled to be unconstitutional in its decision *VfSlg. 19.942/2014*.

According to the applicants, differentiation on grounds of gender and sexual orientation constitutes a severe discrimination of the family of the applicants and violates their constitutionally guaranteed rights to respect for private and family life guaranteed by Article 8 of the ECHR and to equality of all citizens before the law pursuant to Article 7 of the Constitution (*BV-G*) and Article 2 of the Basic State Law (*Staatsgrundgesetz, StGG*) in conjunction with Article 14 of the ECHR. Furthermore, they argue that the challenged provision also violates the right of each child to well-being and optimal development and the protection of their interests pursuant to Article 1 of the Federal Constitutional Act on the Rights of Children.

The applicants hold that the challenged provision obliges the adoption court to apply unconstitutional laws that exclude shared adoptive parenthood of same-sex couples, even if the child has been in foster care of the adopters since his or her birth. In their opinion, such discrimination cannot be objectively justified. They fail to see why it should be in the child's best interest in such constellations to deny the child, *a priori*, the legal institutionalization of their relationship with the individuals they are currently attached to and thus exclude the child from entitlements to maintenance. In their opinion, excluding same-sex couples from the possibility of adoption cannot be justified by the protection of the child's best interests. On the contrary, the challenged legal provision violates the best interests of the child. They state that the requirement of constitutional law according to which the child's best interests are to be taken into account first and foremost must also be observed by the legislator when stipulating the bases for such measures.

The applicants maintain that an unconditional and general prohibition of adoption merely on grounds of the adoptive parents being of the same sex would disproportionately affect the child's best interests if the child has been living in a family constellation similar or even equivalent to the relationship between parents and their child, while adoption cannot be approved solely on account of the parents being of the same sex. They emphasize that such a provision excludes adoption even if the child's best interests demand that adoption be

approved. They therefore hold the challenged provision to be unconstitutional for the aforementioned reasons.

2.2. In summary, the Federal Government counters these statements by the applicants as follows:

The Federal Government agrees with the applicants' opinion that a general exclusion of same-sex registered partners from the adoption of a child cannot be objectively justified. However, the Austrian legal system does not provide for such general exclusion. In the present case, as stated by the Federal Government, the domicile and the place of habitual residence of the adoptive parents and the adoptive child constitute a strong connecting factor of the adoption case to Austria, which is further strengthened by the fact that the adoption contract was concluded in Austria. This requires a strict review of the ordre public reservation pursuant to section 6 of the Private International Law act, which the Vienna Inner City District Court failed to perform. Given the circumstances of the adoption project, the Federal Government regards the approval of adoption as being in the child's best interests. Given the special importance attributed to the protection of the child's best interests in the Austrian legal system, as well as the prohibition of discrimination on ground of gender and sexual orientation, the adoption should have been approved through application of the ordre public clause and the corresponding Austrian substitution law. The unconstitutionality claimed by the applicants is therefore based on a deficiency in the court's decision.

The Federal Government notes that the legislator, having adopted paragraph 1 of section 26 of the Private International Law Act regarding the prerequisites for adoption, decided in favour of a connecting factor to the personal statute of the persons concerned. It concedes that, given the increasing mobility of people, nationality may no longer be of the same value as a connecting factor as in the past. A gradual loss in importance of nationality as a connecting element is to be observed in numerous conflict-of-law rules.

However, as regards status relationships and, in particular, issues of ancestry and the legal relationship between parents and children, such changes are to be viewed with great prudence. The Federal Government holds that, as a rule, such

relationships have their origin in the country of birth, which in the majority of cases also determines the nationality of those concerned. Even if many people no longer spend all their lives in their country of birth, the relationship with this state remains important and significant. Taking the law of the country of birth into account is appropriate not least because otherwise there is a risk of so-called “limping status relationships” emerging. Such relationships are characterized by the fact that the family status is recognized by one state, but not by other states. As a rule, limping status relationships are extremely unfavourable for the persons concerned, as numerous provisions connect to a specific status under family law. The Federal Government therefore is of the opinion that the principle of nationality in ancestry law is fundamentally justified. The protection of the fundamental values of the Austrian legal system is guaranteed by the ordre public reservation pursuant to section 6 of the Private International Law Act.

2.3. The relevant law reads as follows:

2.3.1. Section 26 para. 1 *IPR-G* stipulates that the prerequisites for adoption of a child and the termination of adoption are to be assessed on the basis of the personal statute of each adopter and the personal statute of the child. Pursuant to section 9 para. 1 *IPR-G*, the personal statute of a natural person is the law of the state of which the person is a national. In the present proceedings, the admissibility of adoption therefore is to be determined cumulatively in accordance with Czech and Slovak law. Given that the Czech legal system does not provide for adoption by same-sex couples living in a registered partnership, the Vienna Inner City District Court refused to approve the adoption applied for.

2.3.2. Pursuant to former Austrian law (section 191 of Civil Code [*Allgemeines Bürgerliches Gesetzbuch, ABGB*] as amended by Federal Law Gazette *BGBl. I 15/2013*), joint adoption was admissible only if the adopters were married. In conjunction with the corresponding provision of section 8 paragraph 4 of the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz, EPG*), this provision meant that joint adoption was only possible for heterosexual couples, as the law in force at that time only allowed marriage for such couples.

By its decision *VfSlg. 19.942/2014*, the Constitutional Court repealed the first sentence of paragraph 2 of section 191 of the Civil Code (as amended by Federal Law Gazette *BGBl. I 15/2013*) as well as paragraph 4 of the Registered Partnership Act for violation of Article 8 in conjunction with Article 14 of the ECHR, and for violation of the principle of equality. These provisions, which resulted in unequal legal treatment of registered partners versus spouses and versus same-sex and heterosexual persons living in a common-law partnership as well as registered partners in respect of stepchild adoption and, consequently, of adoptive children in respect of registered partners versus adoptive children in respect of persons living in the other aforementioned constellations, were held to lack the necessary objective justification.

In accordance with the law in force, adoption is now open to single persons, spouses and registered partners (cf. *Deixler-Hübner*, § 191 ABGB, in: Kletečka/Schauer [Ed.], ABGB-ON$^{1.06}$, rdb.at, as of 15/01/2021, point 3 f.) as well as non-registered partners (cf. VfGH 6.12.2021, G 247/2021). These possibilities exist irrespective of the sexual orientation of the adopting persons. In the legislator's opinion, adoption in these constellations is not only in the child's best interests, but may even be advisable for this reason. Pursuant to section 194 paragraph 1, first sentence, of the Civil Code, the court has to examine in each individual case if adoption is in the child's best interests and if a relationship corresponding to that existing between biological parents and their children exists or is to be established.

2.4. The Constitutional Court does not share the applicants' concern under constitutional law regarding the challenged provision:

2.4.1. The principle of equality is binding for the legislator too (cf. e.g. *VfSlg*. 13.327/1993, 16.407/2001). It substantively restricts the legislator's freedom by prohibiting rules providing for inequalities that cannot be objectively justified (cf. e.g. *VfSlg*. 14.039/1995, 16.407/2001). Unequal treatment by the law, which is connected to characteristics susceptible to discrimination, as contained in the second sentence of paragraph 1 of Article 7 of the Constitution (*BV-G*), can only be justified for particularly serious reasons (cf. *VfSlg*. 19.942/2014 with further references to the Constitutional Court's case law

on legal differentiations connected to gender and sexual orientation; cf. also *VfSlg*. 20.225/2017).

2.4.2. Section 6 of the International Private Law Act demands that a provision of foreign law be not applied if its application would lead to a result that is incompatible with the fundamental values of the Austrian legal system (ordre public reservation). According to the case law of the Supreme Court, this holds for rules on succession discriminating women versus men and thus violating the principle of equal treatment of men and women (Supreme Court 29.01.2019, 2 Ob 170/18s). In the present proceedings, too, the application of the foreign law violated the fundamental values of the Austrian legal system:

The principle of equality enshrined in Article 7 of the Constitution prohibits any discrimination on grounds of personal characteristics, such as sexual orientation and gender (cf. *VfSlg*. 20.225/2017). The Constitutional Court sees no particularly serious reasons for which registered partners of the same sex should be denied joint adoptive parenthood of an adoptive child (cf. *VfSlg*. 19.942/2014). A (national) rule to the contrary would violate the principle of equality laid down in Article 7 of the Constitution as well as the right to the respect for private and family life pursuant to Article 8 ECHR.

The Constitutional Court shares the opinion of the Supreme Court that the ordre public clause of section 6 *IPR-G* is to be invoked "as rarely as possible" (cf. e.g. OGH 10.7.1986, 7 Ob 600/86). However, in specifying the notion of ordre public, the fundamental rights and the Constitution in general play a central role (cf. *Neumayr*, § 6 IPRG, in: Koziol/P. Bydlinski/Bollenberger [Ed.], ABGB Kurzkommentar[6], 2020, point 3). Against the background of the case law of the Constitutional Court, as outlined above, a provision of the foreign law forbidding the adoption of a child for the mere reason that the adopters are of the same sex is deemed to be incompatible with the fundamental values of the Austrian legal system.

2.4.3. Furthermore, in its decision *VfSlg*. 19.942/2014, the Constitutional Court already stated that the child's best interests do not justify the fundamental exclusion of registered same-sex partners from the possibility of joint adoption of an adoptive child, but that adoption may even be considered advisable for this

reason (cf. also *VfGH* 6.12.2021, G 247/2021). It would also be in conflict with the fundamental values of the Austrian legal system if the foreign law were to oblige the Austrian adoption court to take a decision running counter to the child's best interests.

2.5. Section 6 of the International Private Law Act allows the ordinary courts not to apply the foreign law which, in principle, would have to be applied pursuant to the challenged provision, if it were to lead to a result – as in the present case – that is in conflict with the fundamental values of the Austrian legal system. For this reason, contrary to the applicants' claim, section 26 paragraph 1 *IPR-G* is not unconstitutional.

For reasons of constitutional law, the court of first instance therefore should have held that the relevant provisions of the foreign law are not to be applied and that, instead, the corresponding provisions of Austrian law must be applied, which in principle do not prevent the adoption of a child by registered partners of the same sex.

## V. Result

1. The concerns raised in respect of the constitutionality of section 26 paragraph 1 of the International Private Law Act are not justified. The application therefore is to be dismissed as unfounded.

2. Pursuant to section 19 paragraph 4 of the Constitutional Court Act, this decision was taken without oral hearing in a private session.

3. Expenses are not to be awarded, as in the case of an application in accordance with Article 140 paragraph 1 sub-paragraph 1 point d of the Constitution it is up to the competent ordinary court to decide on any claims for reimbursement of expenses according to the provisions applicable to its proceedings (e.g. *VfSlg*. 20.102/2016, 20.112/2016).

Vienna, 18 June 2022
The President
GRABENWARTER

Recording clerk:
FINZ